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Hassan Jabareen

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Note from the Field

Transnational Lawyering and Legal Resistance in National Courts: Palestinian Cases Before the Israeli Supreme Court

Hassan Jabareen[†]

This Note explores the strategies of transnational cause lawyers working within national courts. It begins by documenting the emerging use of international norms and arguments for the purpose of mobilizing local communities and affecting domestic laws. The use of transnational law today broadens the legal imagination of lawyers beyond their national borders, constraints, and traditional audiences. Redefining the boundaries of a legal victory, transnational law provides lawyers with tools to continue bringing legal challenges while avoiding the dilemmas of legitimating oppressive legal structures.

This Note presents a case study of transnational lawyering, in the context of challenging ongoing military operations through the invocation of international humanitarian law. In 2002, lawyers from Adalah – The Legal Center for Arab Minority Rights in Israel – filed an unprecedented series of petitions before the Supreme Court of Israel during an unfolding military operation in the West Bank. They did this despite knowing that

[†] The Author is a lawyer and the Founder and General Director of Adalah – The Legal Center for Arab Minority Rights in Israel (www.adalah.org). He is also an Adjunct Lecturer at the Faculty of Law, Tel Aviv University and at the Faculty of Law, Haifa University. In the 2005-2006 academic year, he was nominated by Yale University as a Yale World Fellow. The Author wishes to thank Rina Rosenberg and Diala Shamas for their comments and all of their work in helping to publish this Note.

the Supreme Court would not intervene in the military's operational activities. The article chronicles the choices made by the Adalah lawyers who sought to use the petitions as a vehicle to create a legal and historical record of the events. Bypassing domestic law, the petitions were anchored in international humanitarian law principles. They spurred official state, military, and judicial responses to the allegations while the hostilities were still ongoing, a crucial record amidst an enforced media blackout. The case illustrates how transnational lawyering succeeded in mobilizing international bodies through domestic courts.

I. INTRODUCTION

The legal literature on lawyering for social and political change focuses primarily on the work of lawyers within the framework of a country's sovereign borders. The law, courts, and communities these lawyers address and wish to mobilize are all local. According to this literature, legal success is measured by the results achieved in decisions delivered by national courts.

The first part of this Note argues that the use of transnational law today broadens the legal imagination of lawyers beyond the borders of national sovereignty. Transnational law influences the legal strategies of lawyers: it gives additional meaning to what constitutes legal success; it affects our ability to avoid the problem of the legitimization of norms in oppressive legal systems; and it offers possibilities of legal resistance within the law and through it.

The second part of this Note presents a case study on the emerging use of transnational lawyering in national courts. It discusses a series of four petitions brought before the Supreme Court of Israel by Adalah – The Legal Center for Arab Minority Rights in Israel. These cases highlight the strategies used by transnational lawyers given the unfavorable situation in the national court. The section relies heavily on the language of petitions, the responses of the Attorney General's office, and the decisions of the Supreme Court in describing these events.

In 2002, Adalah attorneys were confronted with formulating a response to an Israeli military assault on the Occupied Palestinian Territory (OPT). Specifically, for ten days in April 2002, the Israeli Army conducted a devastating military operation in the Jenin refugee camp in the West Bank. Despite recognizing that the Israeli Supreme Court would not intervene in the military's operational activities and that the petitions submitted would be rejected, Adalah nevertheless decided, for the first time, to initiate emergency litigation *during* and *against* the ongoing military activity.

Through this litigation, Adalah attempted to generate legal resistance in the domestic courts. In order to do this, the petitions addressed the Supreme Court and sought to widen the public debate in Israel by inserting

international law and international public opinion, as obtained through wide media outreach, into the discussion. The legal proceedings were used not only to challenge the gross violations of human rights against Palestinian civilians in the OPT, but also to create a legal and historical record through the petitions, state responses, and court decisions concerning these practices, and to mobilize international actors such as the United Nations.

II. HUMAN RIGHTS LAW AND THE RISE OF TRANSNATIONAL LAWYERING

International human rights norms have led to a change in the status and traditional meaning of “national sovereignty.” While classic international law defined national sovereignty as mutual respect between countries and non-intervention in their internal affairs, international human rights law emphasizes the obligations of states to protect and promote the rights of citizens and residents. Antonio Cassese argues that human rights law competes with, or even contradicts, the traditional meaning of sovereignty.¹ Seyla Benhabib goes even further, contending that we are now in an era of cosmopolitan norms that undermine the era of territorial sovereignty, which regarded the state as the supreme authority for exercising judicial power over anyone living within its jurisdiction.² The rising power of human rights discourse, however, does not necessarily correlate with a decline in human rights abuses. In reference to the fall of the Berlin Wall, Brenda Cossman presciently wrote in 1991 that “[a]s the Wall is dismantled in Europe, new walls may only be going up elsewhere.”³

Nonetheless, international human rights legal discourse has gained momentum and strength in recent years in places where it had previously been neglected, notably in the United States. In light of the flagrant human rights violations committed by the Bush administration following the events of September 11, 2001, civil rights and human rights activists at both the domestic and the international level have been increasingly engaged with international human rights principles.⁴ As Joseph Raz observed, “[i]t

1. ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 148 (1986).

2. SEYLA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, CITIZENS, AND RESIDENTS* 4 (2004).

3. Brenda Cossman, *Reform, Revolution or Retrenchments? International Human Rights in the Post-Cold War Era*, 32 HARV. INT'L L.J. 339, 339 (1991).

4. As Harold Koh writes:

War is being waged on both domestic and international fronts, and civil and criminal sanctions are being used interchangeably. As a result, predictably, when any particular issue surfaces, we don't know immediately which legal box to put it in. Take, for example, the legal status of al-Qaeda and Taliban detainees in Guantanamo. Are they prisoners of war – a term from the international laws of war? Or are they common criminals, a term of domestic criminal law? Or are they “unlawful combatants” – a category resurrected from World War II and expanded effectively to take them outside the scope of the law altogether?

is a good time for human rights in that claims of such rights are used more widely in the conduct of world affairs than before.”⁵

Yet how does this rise of international human rights discourse, championed by scholars and a small but growing community of international jurists, incorporate itself into national courts that traditionally rely almost exclusively on domestic law?

In 1956, Philip Jessup in his classic book *Transnational Law* called upon lawyers to use not only classic international law but also transnational law in courts. Jessup defined “transnational law” as “all law which regulates actions or events that transcend national frontiers,” including “both public and private international law” and “other rules which do not wholly fit into such standard categories.”⁶ Forty-five years after this call, United States Supreme Court Justice Sandra Day O’Connor noted that American courts were hearing an increasing number of cases involving comparative law and international law. She stressed that this was “because international law is no longer confined in relevance to a few treaties and business agreements. Rather, it has taken on the character of transnational law – what Philip Jessup has defined. . . .”⁷

Pursuant to Jessup’s definition, transnational law is not purely international law, regional law, comparative law, global legal literature, nor national law. Rather, it is a combination of all of those things.⁸ Major developments in the area of transnational law over the last two decades – including state parties’ ratification of United Nations international human rights conventions, the issuance of United Nations treaty-body concluding observations and case law, the establishment and growing jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda and the International Criminal Court, and the wide-ranging decisions of regional courts such as the European Court of Human Rights and the Inter-American Court of Human Rights – all affect the work of human rights lawyers. Transnational law expands the imagination and professional consciousness of these lawyers. They are no longer only local

Harold Koh, *The Law Under Stress After September 11*, 31 INT’L J. LEGAL INFO. 317 (2003).

5. Joseph Raz, *Human Rights Without Foundations* 1 (Univ. of Oxford Faculty of Law Legal Studies Research Paper Series, Working Paper No. 14, 2007).

6. PHILIP JESSUP, *TRANSNATIONAL LAW* 2 (1956).

7. Sandra Day O’Connor, *Keynote Address at the Ninety-sixth Meeting of the American Society of International Law (ASIL)*, 96 ASIL PROCEEDINGS 348, 350 (2002). Justice Ruth Bader-Ginsburg also notably asked the lawyer in one of the hearings regarding affirmative action: “We’re part of a world, and this problem is a global problem. Other countries operating under the same equality norm have confronted it. Our neighbor to the north, Canada, has, the European Union, South Africa and they all approved this kind of, they call it positive discrimination. . . . They have rejected what you recited as the ills that follow from this. Should we shut that from our view at all or should we consider what judges in other places have said on this subject?” Transcript of Oral Argument at 24, *Gratz v. Bollinger*, 123 S.Ct. 2411 (2003) (No.02-516); see also Anne-Marie Slaughter & William Burke-White, *The Future of International Law is Domestic (or, The European Way of Law)*, 47 HARV. INT’L L.J. 327, 349 (2006).

8. Compare HENRY STEINER, DETLEV VAGTS, & HAROLD KOH, *TRANSNATIONAL LEGAL PROBLEMS* (4th ed, The Foundation Press, 1994); Harold Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397 (1999).

attorneys, but part of a wider, global community. Transnational lawyers employ comparative law, international law, and regional law in order to protect and defend against violations of human rights. They do this in the framework of their professional work in the national courts and in various United Nations fora, by building international coalitions, exchanging legal information, and disseminating this information through local and international media.

It is no coincidence that the leading organization in the United States in the field of civil and human rights, the American Civil Liberties Union (A.C.L.U.), which for decades worked only locally and nationally, recently initiated an international advocacy project.⁹ The lawyers working within this project appear before and report to United Nations committees in Geneva about human rights abuses by the United States military at Guantánamo Bay, Cuba, and in Iraq, and also employ a comparative and international law approach in United States courts.¹⁰

In other examples, British and Turkish lawyers have compelled the government of Turkey to appear before and defend a ruling of the Turkish national court before the European Court of Human Rights. Lawyers working with Amnesty International have submitted an extradition request against Augusto Pinochet in London for crimes he committed as President of Chile. Belgian and Palestinian lawyers have filed a lawsuit in Belgium against former Prime Minister of Israel Ariel Sharon for war crimes committed against Palestinians living in the Sabra and Shatila refugee camp in Lebanon in 1982.

United Nations institutions boosted the standing of transnational lawyers when they recognized the importance of their work with non-governmental human rights organizations. These organizations provide reports assessing whether State Parties are in compliance with their obligations under the international conventions on human rights. In response to this crucial activity, the United Nations pledged "to be open to and work closely with civil society organizations that are active in their respective sectors, and to facilitate increased consultation and cooperation between the United Nations and such organizations."¹¹ In response to these

9. National Security and the Human Rights Program, American Civil Liberties Union, <http://www.aclu.org/human-rights/national-security-and-human-rights-program> (last visit June 14, 2010).

10. *Id.*

11. The Secretary-General, *Report of the Secretary-General on Renewing the United Nations: A Program for Reform*, p. 60, delivered to the General Assembly, U.N. Doc. A/51/950 (July 14, 1997). The Under-Secretary General for Policy Coordination for Sustainable Development declared: "NGOs and, more generally, organizations of the civil society no longer simply have a consumer relationship with the United Nations. They have increasingly assumed the role of promoters of new ideas, they have alerted the international community to emerging issues, and they have developed expertise and talent which, in an increasing number of areas, have become vital to the work of the United Nations, both at the policy and operational levels." Nitin Desai, U.N. Under-Secretary-General for Policy Coordination & Sustainable Dev., Remarks at the Meeting of the Organizational Session of the Open-Ended Working Group of the Economic and Social Council on the Review of Arrangements for Consultations with Non-

developments, many scholars have recognized the increasing role that NGOs play in the international legal and political systems. Michael Posner and Candy Whittome write: "The United Nations' human rights system depends on NGOs, it would collapse without their information. Furthermore, without the lobbying of NGOs, states sympathetic to the issues would operate in a vacuum."¹²

A transnational lawyer is an attorney whose work is not confined within national territorial borders; national courts do not constitute the last venue for action for these lawyers, but rather mark only one step among several available global venues. The rejection of a lawsuit by a national court is not the final word. International courts and tribunals, regional courts, United Nations human rights committees, or international human rights organizations, will ultimately decide whether a violation of human rights has occurred.

Yet opportunities to bring cases before international courts remain rare given the myriad of barriers surrounding the nascent world of international human rights litigation. Most human rights litigation is still undertaken within the confines of national courts. This Note concerns itself with those transnational lawyers who work within unfriendly domestic legal systems and who seek to incorporate more protective international standards into their domestic law and legal systems.

A. Legal Resistance or Legitimation?

The professional legal literature on public interest attorneys focuses on their struggles primarily through national or domestic law and on the possibilities of change within that local framework. Some scholars argue that lawyers who seek to promote human rights in their countries by engaging in litigation within their national systems may in fact grant legitimacy to domestic legal norms that clash with principles of human rights. Stephen Ellmann, who practiced law in South Africa during the Apartheid regime, and who, as a lawyer, saw some success in defending human rights within the framework of the state's domestic law, described the dilemma as follows:

A specter is haunting lawyers working against injustice – the specter of legitimation. Those who seek to challenge unjust states by using the law of those states against them are very likely to feel tarnished by the need to speak in terms of laws they despise. This sense of personal taint is bad enough, and sometimes may simply be intolerable.¹³

Governmental Organizations (Feb. 17, 1994), *quoted in* Michael H. Posner & Candy Whittome, *The Status of Human Rights NGOs*, 25 COLUM. HUM. RTS. L. REV. 269, 275 (1993-1994).

12. Posner & Whittome, *supra* note 11, at 275.

13. Stephen Ellmann, *Struggle and Legitimation*, 20 LAW & SOC. INQUIRY 339, 339 (1995). *See*

Transnational law expands the strategies available to transnational lawyers, allowing them to overcome this “specter of legitimation” by giving issues such as the rule of law and legitimacy a new dimension. Transnational human rights law provides legal arguments for attorneys that extend beyond the boundaries of internal domestic law. Transnational lawyers use national law to the extent that it does not clash with international laws, but they are also not confined to it: they actively use and incorporate a wide spectrum of international law in national courts.¹⁴ Anthony D’Amato describes this well: “Courts throughout the world can be a forum in which people can assert the primacy of their human rights in all situations in which states are impeding the realization of those rights.”¹⁵

Scholars who argue that transnational human rights law does not take precedence over national law still concede that the norms of human rights often compel the State and national courts to justify their decisions in terms of these norms.¹⁶ Eyal Benvenisti, a prominent Israeli professor of international law, argues that while in the past national courts relied on international law as a *shield* to protect their governments from external intervention, today national courts make extensive use of international and comparative law as a *sword* in their judicial critiques of domestic government practices.¹⁷ Because flagrant violations of human rights, particularly those that appear in the Rome Statute of the International Criminal Court, justify international intervention, these norms act as a deterring force.¹⁸ This force shifts the burden of persuasion or justification for practices that violate human rights to state government perpetrators. For example, if torture in a particular state is considered legitimate under certain circumstances, such as the need to extract vital information from a

also Gad Barzilai, *The Evasive Facets of Law: Litigation as Collective Action*, 10 ADALAH’S NEWSLETTER, (Adalah, Haifa, Israel), Feb. 2005, <http://www.adalah.org/newsletter/eng/feb05/ar2.pdf> (discussing the question of legitimation in the context of Palestinian litigation).

14. See Francesco Francioni, *International Law as a Common Language for National Courts*, 36 TEX. INT’L L.J. 587, 588 (2001). See also Yuval Shany, *National Courts as International Actors: Jurisdictional Implications* (Hebrew Univ. Int’l Law Research Paper No. 22-08, 2008), available at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=94983 (describing the increased application of international law by national courts as a means for critiquing government policies from within).

15. Anthony D’Amato, *The Relation of the Individual to the State in the Era of Human Rights*, 24 TEX. INT’L L.J. 1, 12 (1989).

16. See Gráinne de Búrca & Oliver Gerstenberg, *The Denationalization of Constitutional Law*, 47 HARV. INT’L L.J. 243, 244 (2006) (noting that “international law obligates states merely to justify those local practices that deviate from a shared, publicly evolving, cross-community set of standards”).

17. See generally Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT’L L. 241 (2008).

18. See INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT xi (2001) (concluding that “[w]here a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or overt it, the principle of non-intervention yields to the international responsibility to protect”).

detainee to prevent an imminent danger, a transnational lawyer can argue in the national court that torture is absolutely prohibited in all circumstances according to international norms. The burden is therefore on the state's attorney and the national court to justify the violation, if they can. This burden shift releases the transnational lawyer from the bonds of the national law's norms of oppression, and strengthens the lawyer's arguments overall.

National law is not nullified or marginalized in this era of the internationalization of human rights norms. It continues to be used to promote civil and human rights. After all, one of the most important civil rights rulings in U.S. history, the 1954 Supreme Court decision *Brown v. Board of Education*, declaring racial segregation in schools to be unconstitutional, was based entirely on domestic U.S. law.¹⁹ Rather, the importance of national courts is enhanced when courts allow transnational lawyers to expand their arguments. If national courts were previously an arena for presenting arguments linked to the internal rule of law, today they are also an international arena of sorts, operating in parallel to full-fledged international tribunals. National law will continue to determine at least the procedural issues before national courts, and transnational lawyers must give attention to those procedural aspects in planning any legal strategy.

Transnational lawyers rely on national courts' wish to maintain international legitimacy, lest the courts damage their own reputations by rejecting international human rights norms. Transnational law gives lawyers a rare opportunity to carry out an act of legal resistance within the national legal context itself, something otherwise virtually impossible to do within the framework of national law. Familiar forms of resistance are extra-legal, taking place outside of legal proceedings.²⁰ Yet these instances of extra-legal resistance must promote international norms on human rights, and not cause them harm.²¹

Initiating lawsuits that rely heavily on international norms, such as the series of cases brought by Adalah and discussed in this Note, is not always a simple matter. Public interest attorneys are not elected by a specific constituency to submit lawsuits before any particular legal forum; they do this, in most cases, on their own initiative. Therefore, their commitment to and responsibility toward the cause they wish to advance or defend requires that they exercise extra caution in order to avoid damaging that cause. In general, defensive cases aimed at protecting existing rights or the status quo, as opposed to affirmative rights lawsuits that seek to change a

19. *Brown v. Board of Education*, 347 U.S. 483 (1954).

20. Sally Engle Merry, *Resistance and the Cultural Power of Law*, 29 *LAW & SOC'Y REV.* 11, 15-16 (1995).

21. *See id.* at 24-25 ("Some resistance is clearly damaging to individuals. . . . Some resistance is destructive to community life. . . . We cannot escape judgments about "good" resistance and "bad" resistance. The celebration of some forms of resistance contains implicit commitments to social justice and equality. It would be more honest to acknowledge where we stand and join in the search for a more just world.").

given situation, are not problematic in this respect.²² In defensive lawsuits, by definition, the cause lawyer is not the party initiating the suit. He or she is responding to a threat either as a petitioner, or as a respondent. In some circumstances, however, submitting “defensive” lawsuits with the knowledge that they have no chance of success may damage the cause itself by creating bad precedent.

Furthermore, bringing these lawsuits may sometimes hinder alternative efforts by advocates and grassroots organizations to mobilize a popular campaign against the rights violations by creating a false expectation or anticipation of favorable legal remedies. Samera Esmeir and Rina Rosenberg have provided an account of such an instance in which Adalah refused to litigate a case involving Israel’s attempted confiscation of Palestinian-owned lands in al-Roha in central Israel in 1998.²³ They argued that Adalah was correct in “resisting legalization” in this case, as it recognized that the court would have likely upheld the confiscation, and that such a move would paralyze or diffuse political action and endanger community mobilization. Ultimately Palestinian citizens of Israel resumed their land struggle using grassroots and political means such as demonstrations, strikes, parliamentary debates, and media outreach, and they succeeded in delaying and then canceling the expropriation.

As noted above, however, transnational law can provide another way of avoiding the problem of legitimation through national courts, particularly in cases involving gross violations of international human rights law. An illustrative example is the Israeli Supreme Court’s rulings on the legality of the construction of the Wall.²⁴ From the perspective of the

22. Two examples clearly illustrate this point. The first involves maintaining Arabic as an official language of Israel. Israel defines itself as a “Jewish state,” and one manifestation of this is that Hebrew is the dominant language and various state authorities often neglect the status of the Arabic language. Lawyers might consider initiating an “affirmative rights” case demanding that the authorities change the status quo and translate all the court decisions, which are issued in Hebrew, into Arabic. The considerations about whether or not to bring this case are complex. The court could decide to reject the petition for ideological reasons, which would further damage the official status of Arabic in that it would legitimize its inferior status. But if the case is not brought before the court, the violation of equality itself is legitimized. Adalah has opted not to pursue this case before the Israeli Supreme Court, and is waiting for a better political moment before bringing this challenge. The second example involves a new bill pending before the Israeli Knesset (Israel’s legislature) to ban the commemoration of the *Nakba* by Palestinian Arab citizens of the state. Every year Palestinian citizens of Israel hold commemorative marches to remember the tragedy of the Palestinians who were expelled or forced to flee Mandatory Palestine and become refugees in 1948. In this defensive case, the considerations about whether to challenge the proposed *Nakba* bill are simpler than in the first example. Here it can be assumed that if the bill passes, the damage has already been done by the very enactment of the law, so bringing the case might serve the purpose of providing a stage to highlight the importance of the *Nakba* to Palestinians, and create a public debate locally and internationally about the right of Palestinians to commemorate their history. In fact, the Knesset proposed such a law in 2009 and should it pass, Adalah would certainly challenge it before the Israeli Supreme Court.

23. Samera Esmeir & Rina Rosenberg, *On Resisting Legalization*, ADALAH’S REVIEW (Adalah, Haifa, Israel) Vol. 2, Fall 2000, at 23-25.

24. See HCJ 2056/04, Beit Sourik Vill. Council v. The Gov. of Isr., et al. [2004] IsrSC 58(5)

Palestinians living under Israeli occupation, the Supreme Court decision certainly does not grant legitimacy to the government's decision to build the Wall. For most Palestinians, the Israeli Supreme Court is but one of the institutions and mechanisms of the occupation. It is telling, for example, that no academic institution, law firm, or even NGO in the OPT regularly translates the Israeli Supreme Court's rulings pertaining to the OPT into Arabic. The Supreme Court itself also does not translate its rulings pertaining to the OPT into Arabic. When a Palestinian human rights organization occasionally translates Supreme Court rulings into English, it does so to strengthen the international lobby against the occupier's policy.

Although Palestinians did not confer legitimacy on the Israeli Supreme Court's rulings on the Wall, they took an intense interest in the Advisory Opinion of the International Court of Justice (ICJ).²⁵ Palestinian national institutions invested considerable staff and financial resources to present the Palestinian arguments before this court. Critical international discourse intensified only after the ICJ delivered its opinion, and not when Israel began building the Wall. Without a doubt, the ICJ's opinion strengthened the Palestinians' struggle against the construction of the Wall. As Brenda Cossman notes:

Human rights is a powerful political discourse. Indeed, it is often the only discourse in which disadvantaged groups may claim a voice and legitimately make universal claims. International, national and grassroots organizations continue to make human rights the discourse of choice in their struggles. Despite its institutional limitations, the discourse provides an important source of political inspiration and energy through which people can be educated and mobilized.²⁶

In parallel, in the Israeli arena, it is difficult to argue that the Israeli Supreme Court's approval of the building of the Wall is what accorded its continued construction legitimacy in the eyes of the Israeli public. Legitimacy for this act exists without the Supreme Court's explanations and justifications. The ICJ's opinion might have shown a small part of the Israeli public that the Supreme Court's ruling is inconsistent with international norms and, therefore, the ongoing construction of the Wall should be halted. Yet the overwhelming majority of the Israeli public

807, available at http://elyon1.court.gov.il/files_eng/04/560/020/a28/04020560.a28.pdf; HCJ 7957/04, *Mara'abe v. The Prime Minister of Israel* [2005] IsrSC 38(2) 393, available at http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.pdf.

25. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Req. for Advisory Op.) (Order of July 9, 2004), 43 I.L.M 1009 (2004). See also Diana Buttu, *The ICJ Ruling: Looking Back*, ADALAH NEWSLETTER, (Adalah, Haifa, Israel) Vol. 62, July 2009, available at <http://www.adalah.org/newsletter/eng/jul09/9.php> (criticizing the Palestinian Authority for its failure to capitalize on the importance of the ICJ's advisory opinion).

26. See Cossman, *supra* note 3, at 340 (internal citations omitted).

supported the Wall's construction.²⁷ Thus, in the public's view the Supreme Court had legitimately defended the State's actions, and had not "surrendered" to international pressure. One way or the other, it is very doubtful that the Supreme Court's ruling on the Wall vis-à-vis transnational law boosted the standing of the Court in the eyes of its public as a neutral court.

Transnational lawyers are liberated to a great extent from the bonds of national legal norms that violate human rights law. These lawyers now pursue measures of legal resistance within local legal proceedings by relying upon norms of transnational law. The power, weight, and importance of these norms enable transnational lawyers to develop new legal strategies that were not available in the past.

B. Documentation of the Violations: Local and International Mobilization

The work of public interest lawyers is never limited to the courtroom. The critical professional literature addresses the power of public interest attorneys to use law to create social movements.²⁸ Precisely because of its social-political characteristics, law offers an opportunity for lawyers to work with a broad public. Together with their clients, they can expose how law shapes public awareness by granting legitimacy to the existing social structure that perpetuates alienation and injustice. However, this literature also focuses mainly on the local community and local dynamics.

Transnational law provides a new avenue for lawyers by targeting the international community, including international civil society and the United Nations. The use of local legal processes is not only intended to create domestic social movements, it is also a tool for generating global discussion of policies of oppression and human rights abuses that national courts seek to defend and recreate. In her pioneering study about Israeli and Palestinian cause lawyers, Lisa Hajjar describes their work before the military courts in the OPT and how they use their knowledge of the English language and the information they obtain through their litigation to speak to the international community about the oppressive policies of the occupation.²⁹

Transnational lawyers can generate documentation of abuses and the creation of an official record through national judicial proceedings in order to strengthen both the internal and the international struggle against local human rights violations. A domestic judicial proceeding that includes the

27. See YEHUDA BEN MEIR & DAPHNA SHAKED, *The Israeli Body Politic: Views on Key National Security Issues*, 10 STRATEGIC ASSESSMENT 25, 27 (2007), available at <http://www.inss.org.il/publications.php?cat=21&incat=&read=11>.

28. See, e.g., Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 370, 376 n.10 (1982-1983).

29. Lisa Hajjar, *Cause Lawyering in Transnational Perspective: National Conflict and Human Rights in Israel/Palestine*, 31 LAW & SOC'Y REV. 473 (1997).

petitioners' arguments, the state's response, and the Court's ruling in and of itself generates legal and historical documentation and information about the human rights violations. This information is important due to its official and institutional nature. It constitutes historical documentation of the violations themselves, via both the written arguments submitted to the courts and the final rulings. According to E.P. Thompson, while classic Marxist criticism of law (which maintains that law generally serves the interests of the dominant class) is correct, the rule of law is an institution that enjoys its own unique logical characteristics.³⁰ Legal forms, Thompson argues, also impose obstacles and limitations on rulers in order to strengthen the legitimacy of their rule and their appearance as independent arbiters of justice.³¹

These contradictions offer an opportunity for transnational lawyers: they can exploit the information they discover through these legal forms in order to remove the "mask" that seeks to conceal injustice. Courts that wish to appear independent will ask the state to respond to the violations of human rights. State attorneys who see themselves as part of the justice system defend the state's position by providing justification for the violations. They will do this, and to some extent without concealing substantial information from the Court or without "deceiving" the Court, to protect the independence and integrity of the law in the eyes of the public. The Court will also write its ruling based on the information presented to it, because hiding this information from the readers would damage the Court's reputation, even if only in the eyes of the clients appearing before it.

Information generated as a result of these proceedings serves as official documentation of human rights violations before international fora such as the United Nations and bodies of the European Union, as well as in the media. Information also stirs public debate. These documents and rulings will be part of the historical-legal record of the state.

Thus, such a use of transnational law by human rights lawyers, even in cases of legal defeat in the domestic judicial arena, is likely to become a catalyst for mobilizing, assisting, and strengthening the local human rights movement and its objectives. It may also bolster public dissent and reinforce the voices critical of a national jurisprudence that contravenes international human rights norms. In certain circumstances, the rejection of a lawsuit by national courts can actually create a positive social-political dynamic against the decision if it is inconsistent with international law.

Resistance cases create new balances of power in the national courts. Human rights lawyers are no longer merely local actors representing a weak group, but instead they join the ranks of an international network of human rights advocates.

30. E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 262* (1975)

31. *Id.* at 264-65.

II. PALESTINIAN CASES BEFORE THE ISRAELI SUPREME COURT

This section focuses on the litigation brought by Adalah's lawyers during the Israeli military operation "Defensive Shield." The specific cases highlighted here are those brought from April 3, 2002, when the Israeli military entered the Jenin refugee camp in the West Bank, through April 18, 2002, when they left the camp. The litigation includes correspondence with various Israeli military and civil agencies as well as the submission of four petitions to the Israeli Supreme Court regarding events that occurred in the Jenin refugee camp. Notably, the litigation proceeded *during* and *against* the ongoing operational activity of the Israeli military. Such legal challenges were not the customary practice of human rights organizations at the time, if only because the Supreme Court was likely to refrain from intervening while military activity was underway. The petitioners relied on international law sources such as the Fourth Geneva Convention, the Rome Statute, and rulings by the International Criminal Tribunal for the former Yugoslavia (ICTY) regarding the protection of civilian populations, the demolition of homes, and the definition of war crimes. These cases marked the first time that the Rome Statute and ICTY jurisprudence were brought before the Israeli Supreme Court.

In this Note I will examine the performance of Adalah's attorneys as transnational lawyers with respect to the following issues: documentation of human rights abuses through legal proceedings; the element of deterrence in the legal proceeding; the ability to generate public debate during and after the hearings; the use of official information in international fora; and the use of transnational law as it relates to the act of legal resistance and the question of legitimation. For the sake of full disclosure, I wish to note that I was involved in litigating these cases together with my colleagues at Adalah.

A. A Summary of the Events

At the end of March 2002, the government of Israel, led by the former prime minister Ariel Sharon, launched a wide-scale military operation including incursions into Palestinian cities in the West Bank under the administration of the Palestinian Authority. This military campaign was named "Operation Defensive Shield." The Israeli government argued that this campaign came in response to a series of Palestinian suicide bombings which killed many Israeli citizens.

Mary Robinson, the United Nations High Commissioner for Human Rights at the time, reported on the extensive damage caused by Operation Defensive Shield.³² She noted that according to the figures of the Palestinian

32. U.N. Econ & Soc. Council [ECOSOC], Comm'n on Human Rights, *Report of the High Commission for Human Rights and Follow-up to the World Conference on Human Rights*, U.N. Doc. E/CN.4/2002/184 (Apr. 24, 2002) (prepared by Mary Robinson), available at

Red Crescent, some 217 Palestinians were killed and 498 were injured between March 29 and April 21, 2002.³³ She further stated that according to an Israeli human rights organization, some 2,521 Palestinians were detained from the beginning of the operation through April 16, 2002, with some detainees being held in the Ketziot detention camp in the Negev under very harsh conditions that failed to meet the minimal international standards.³⁴ In addition, she found that the Israeli army used Palestinians as human shields.³⁵ Based on information provided by Reporters Without Borders, she reported that seven journalists were wounded, fifteen journalists were arrested, and sixty journalists came under fire by the army and that passports and documents were confiscated from journalists in twenty cases.³⁶ Meanwhile, six Palestinian cities were declared closed military areas, off-limits to all journalists during the operation.³⁷

The military operations in the Jenin refugee camp stood out for the striking and startling damage that they caused. The High Commissioner's report went on to cite UNRWA statistics, noting that the Israeli army destroyed the property and private possessions of hundreds of families: it was estimated that in the Jenin refugee camp nearly 800 homes were completely or partially destroyed, leaving 4,000 to 5,000 people without shelter.³⁸ In addition, the report stated:

The Israeli army launched an offensive on the Jenin refugee camp on 3 April 2002 and withdrew on 18 April. During this period, the United Nations, humanitarian relief agencies and the media were denied access to the camp. During the same period, there were unconfirmed reports of high casualties, mainly Palestinian civilians, and widespread destruction of the camp.

Following the withdrawal of the Israeli army, humanitarian relief organizations and the foreign media were able to enter the camp and make on-the-spot visual assessments. The United Nations Special Coordinator for the Middle East Peace Process, Terje Roed-Larsen, was among the international figures who visited the camp on 18 April. He described the scene as "horrific beyond belief" and stated: "It is totally destroyed; it is like an earthquake; we have expert people here who have been in war zones and earthquakes and they say they have never seen anything like it." He added that it was "morally repugnant" that the Israelis had not allowed rescue teams in after the fighting was over.³⁹

<http://unispal.un.org/UNISPAL.NSF/0/7A6320F63E6FB76F85256BAA0052C925>.

33. *Id.* ¶ 11.

34. *Id.* ¶¶ 17, 20.

35. *Id.* ¶¶ 22-24.

36. *Id.* ¶ 25.

37. *Id.* ¶¶ 25-26.

38. *Id.* ¶ 13.

39. *Id.* ¶¶ 47, 48.

B. Legal Resistance Based on Transnational Law

During the military incursions and the imposed curfews, human rights organizations, as well as local and foreign journalists were prohibited from entering certain areas, in particular the Jenin refugee camp. At the beginning of the operation, Adalah immediately instituted an emergency agenda to legally challenge the Israeli military's conduct of hostilities. Three leading Palestinian human rights organizations – Adalah, LAW [Qanun] - The Palestinian Society for the Protection of Human Rights & the Environment (in the West Bank) and the Palestinian Centre for Human Rights (in Gaza) – formed a coalition towards this end. Adalah and LAW directed their legal activities to Israeli legal fora. An organizational document entitled *Adalah's Emergency Agenda 1-10 April 2002*, states:

With the massive escalation of violence by the Israeli army against Palestinian residents of the West Bank in late March 2002, Adalah set aside its normal program of work and adopted an 'emergency agenda' . . . Adalah is urgently seeking to bring to the attention of the courts, the public, the international community and the media severe violations of human rights and international humanitarian law being perpetrated by the Israeli army in the West Bank. Inside Israel, Adalah is representing political activists and detainees who participated in demonstrations opposing governmental policy and the Israeli army attack.⁴⁰

The coalition also sought the participation and support of Jewish Israeli human rights legal organizations, especially the Association for Civil Rights in Israel (ACRI), in order to present a united front before the Israeli Supreme Court against the human rights violations in the OPT. The coalition believed that ACRI would join these petitions, albeit not immediately, as it was apparent from the outset that there was scant hope of the court's positive judicial intervention. ACRI's main target audience is the Jewish-Israeli public, a great majority of whom supported the Israeli military operation. Palestinians, both in Israel and in the OPT, form the direct target audiences of Adalah and its Palestinian human rights partners; they perceived the operation as a series of hostile attacks against the Palestinian civilian population. The national affiliations of the human rights organizations significantly influenced their understanding of the goals and objectives of the litigation. In general, ACRI initiates cases when it has a strong legal basis in Israeli law and a high chance of success in court. Furthermore, ACRI would not perceive the litigation as a matter of resistance.⁴¹ Adalah generally follows a similar case selection policy, but in

40. Adalah, *Adalah's Emergency Agenda 1 – 10 Apr. 2002* (Apr. 10, 2002) (on file with Author).

41. For differences between Adalah and ACRI, see GAD BARZILAI, *COMMUNITIES AND*

certain circumstances where it believes that the initiation of a case is important in and of itself, Adalah will bring a legal challenge. In these cases in 2002, Adalah immediately decided to intervene based on this rationale, but it took ACRI more time to enter the coalition. ACRI's decision-making process with regards to cases challenging military actions is more complex due to its positioning in Israeli Jewish society, and hence it is slower to intervene in these issues than Adalah. Finally, Adalah includes the international community as part of its target audience whereas ACRI's work with international actors is less comprehensive.

The Adalah attorneys leading this litigation clearly recognized that the Supreme Court would not intervene in ongoing military operations and that it would reject the petitions. This assessment was based on past experience: The Supreme Court rarely stepped in to protect the Palestinian civilian population in the OPT and never intervened in matters concerning the military's activities.⁴² The Supreme Court's political considerations often override the rule of law and lead to the rejection of valid petitions.⁴³

The outcome of the petitions would offer no surprises to us. However, Adalah's aim of generating public debate made the procedural aspects of the petitions an important focus during our preparation. Courts can reject petitions on a procedural basis, that is, through "threshold causes." In this way, hearings on the petitions would be rendered unnecessary and the Court could decline to discuss their merits. For the legal proceedings to be effective, they had to adhere to the procedural rules of the Supreme Court, such as the exhaustion of remedies with the relevant authorities before initiating proceedings in court. A high level of documentation and proof is required of the petition's factual section, even if only preliminary and supportive evidence must be concrete and specific. For the majority of these petitions, Adalah directed initial correspondence regarding these events to the Supreme Court Department of the Attorney General's office.⁴⁴ The petitions relied heavily upon the principles of international humanitarian law (IHL) and international criminal law, meticulously citing the precise provisions of international covenants relevant to the particular

LAW: POLITICS AND CULTURE OF LEGAL IDENTITIES, 134-43 (2003) and Helene Sallon, *The Judicialization of Politics in Israel*, 16 BULLETIN DU CENTRE DE RECHERCHE FRANCAIS DE JÉRUSALEM 287, 287-300 (2005) (Isr.), available at <http://bcfrj.revues.org/index259.html>.

42. The only petition that was accepted and in which the Supreme Court intervened in the military's operational activity was the petition submitted in May 2002 in the wake of the Jenin events in regard to the use of Palestinians as human shields. However, the final ruling was issued more than three years later. See HCJ 3799/02, *Adalah et. al v. Yitzhak Eitan*, IDF Commander in the West Bank [2005] 45 I.L.M. 491.

43. See generally DAVID KRETZMER, *THE OCCUPATION OF JUSTICE* (2002); Aeyal M. Gross, *Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?*, 18 EUR. J. INT'L L. 1 (2007); Orna Ben Naftali, Aeyal M. Gross & Keren Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 BERKELEY J. INT'L L. 551 (2005).

44. The pre-petition procedure is a letter of intervention to the Attorney General's Office and is used as a last measure to demand that a solution be found or the petitioners' demands met prior to petitioning the Supreme Court. This measure is accepted as part of exhausting the procedures, particularly in urgent cases.

issue. We accompanied the petitions' submission with extensive media outreach in Arabic, Hebrew, and English.

To assess the scope and type of legal work conducted during this period, I reviewed the titles of press releases issued by Adalah between April 3 and April 18, 2002. These titles express Adalah's focus and can also constitute, *inter alia*, legal-narrative documentation of Adalah's work during this crisis period.⁴⁵ This documentation records the events that took

45. The titles of Adalah's press releases issued in English: Press Release, Adalah, Adalah Challenges Revocation of Press Credentials of Palestinian Journalists (Apr. 3, 2002), http://www.adalah.org/eng/pressreleases/02_04_03.htm; Press Release, Adalah, Israeli Army Prohibits Released Palestinian Detainees From Crossing Qalandiyah Checkpoint (Apr. 6, 2002), http://www.adalah.org/eng/pressreleases/02_04_06.htm; Press Release, Adalah, Two Pre-petitions by Adalah and LAW Call on Israeli Army to Cease Attacks on Jenin Hospital and to Release Detained Medical Personnel (Apr. 6, 2002), http://www.adalah.org/eng/pressreleases/02_04_06-2.htm; Press Release, Adalah, Israeli Ministry of the Interior Attempts to Deport French Human Rights Defenders (Apr. 7, 2002), http://www.adalah.org/eng/pressreleases/02_04_07.htm; Press Release, Adalah, Supreme Court Hears Case on Palestinians Wounded and Killed in Jenin and Nablus (Apr. 8, 2002), http://www.adalah.org/eng/pressreleases/02_04_08.htm; Press Release, Adalah, Palestinian Citizens of Israel – Political Detainees in the Naqab (Negev) (Apr. 8, 2002), http://www.adalah.org/eng/pressreleases/02_04_08-2.htm; Press Release, Adalah, Supreme Court Hearing on Massive Home Demolition in Jenin Refugee Camp (Apr. 8, 2002), http://www.adalah.org/eng/pressreleases/02_04_08-3.htm; Press Release, Adalah, State Discloses Details About Ongoing Israeli Army Attack in Jenin Refugee Camp (Apr. 9, 2002), http://www.adalah.org/eng/pressreleases/02_04_09-2.htm; Press Release, Adalah, Supreme Court Dismissed Petition on Wounded and Killed Palestinians in Jenin and Nablus (Apr. 9, 2002), http://www.adalah.org/eng/pressreleases/02_04_09-3.htm; Press Release, Adalah, Supreme Court Rejects Petition Calling on Israeli Army to Stop Demolishing Homes in the Jenin Refugee Camp (Apr. 9, 2002), http://www.adalah.org/eng/pressreleases/02_04_09-4.htm; Press Release, Adalah, LAW, ACRI and Adalah File a Petition to the Supreme Court Against the Israeli Army to Stop the Killing of the Civilian Population in the West Bank (Apr. 9, 2002), http://www.adalah.org/eng/pressreleases/02_04_09-5.htm; Press Release, Adalah, Adalah Files Petition to Supreme Court to Reinstate Press Credentials of Palestinian Journalist (Apr. 11, 2002), http://www.adalah.org/eng/pressreleases/02_04_11.htm; Press Release, Adalah, Due to Curfew and Closure, Palestinian Journalist Cannot be Released from Ramallah Hospital (Apr. 11, 2002), http://www.adalah.org/eng/pressreleases/02_04_11-2.htm; Press Release, Adalah, Adalah and LAW Petition the Israeli Supreme Court to Stop the Burial of Palestinian Fighters and Civilians in Mass Graves in the Jenin Refugee Camp (Apr. 12, 2002), http://www.adalah.org/eng/pressreleases/02_04_12.htm; Press Release, Adalah, Supreme Court to Hear Petitions on Removal of Dead Bodies of Palestinian Fighters and Civilians from Jenin Refugee Camp (Apr. 13, 2002), http://www.adalah.org/eng/pressreleases/02_04_13.htm; Press Release, Adalah, Supreme Court Orders that Humanitarian Agencies be Allowed to Locate and Identify Palestinian Bodies from Jenin Refugee Camp (Apr. 14, 2002), http://www.adalah.org/eng/pressreleases/02_04_14.htm; Press Release, Adalah, Adalah and LAW Call on Supreme Court to Establish Procedures for the Removal of Palestinian Bodies from Jenin Refugee Camp (Apr. 15, 2002), http://www.adalah.org/eng/pressreleases/02_04_15.htm; Press Release, Adalah, Adalah Submits Pre-petition Demanding that the Israeli Army Immediately Cancel the Curfews Imposed on Palestinian Cities in the West Bank (Apr. 16, 2002), http://www.adalah.org/eng/pressreleases/02_04_16-2.htm; Press Release, Adalah, Adalah Demands that Attorney General's Office Compel Israeli Army to Stop Using Palestinian Civilians as Human Shields (Apr. 18, 2002), http://www.adalah.org/eng/pressreleases/02_04_18.htm; Press Release, Adalah, Seven Human Rights Organizations Petition Supreme Court Challenging Inhumane Detention

place during this period within the context of legal actions initiated by Adalah

As elaborated below, Adalah began submitting petitions regarding the Jenin refugee camp on April 8, 2002. These petitions were immediately heard by the Supreme Court on a daily basis, one after another. The litigation proceeded most intensively during the period of April 8, 2002 to April 14, 2002; the four petitions from this period are reviewed below.

C. Petition Against Preventing the Evacuation of the Dead and Wounded

Adalah filed the first petition on the evening of April 7, 2002,⁴⁶ and the presiding judge scheduled a hearing for the next morning before a panel of three justices. Physicians for Human Rights-Israel, another human rights organization, had filed a similar petition on its own initiative that same afternoon.⁴⁷ The Supreme Court joined the cases for hearing before three justices, D. Dorner, A. Procaccia, and E. Levy.

Adalah's petition demanded the evacuation of the injured in the area of Jenin and Nablus by the Palestinian Red Crescent (PRC) and International Committee of the Red Cross (ICRC), and that the families of the deceased be permitted to bring them promptly to a suitable, dignified burial. The first petitioner, injured in his home, was not allowed to be evacuated to the hospital; another petitioner lost two children as a result of shelling by Israeli tanks in the area. The petition notes that: "On Sunday, April 1, 2002, 28 bodies were buried in a common grave in the yard of the Ramallah Governmental Hospital. The burial took place after the morgue had filled up with bodies of the dead and the army had prevented their burial in the cemetery near the hospital."⁴⁸ The petition provided the full names of seven deceased persons from the Nablus and Jenin regions whose bodies were being held at the Almiyadani Hospital on Nasser Street in Nablus pending permission to conduct burials.⁴⁹ It further named another six patients who were refused transfer to major hospitals.⁵⁰

The Attorney General's office submitted its response to the petitions on the day the hearing was held, noting that due to "the extremely short time" that had passed since the filing of the petitions, it had been "clearly impossible to check the specific cases mentioned in the petitions, and certainly not to relate to them in this response being filed with the

Condition of Over 1,400 Palestinians (Apr. 18, 2002), http://www.adalah.org/eng/pressreleases/02_04_18-2.htm.

46. See Petition, HCJ 2941/02, Badia Ra'ik Suabuta & LAW v. Commander of the IDF Forces in the West Bank [2002], available at <http://www.adalah.org/eng/optagenda.php>.

47. See HCJ 2936/02 Physicians for Human Rights v. The Commander of the IDF Forces in the West Bank [2002] IsrSC 56(3) 3. The court joined the two cases for hearings and decision.

48. Petition, *supra* note 46, ¶ 3.

49. *Id.* ¶ 10.

50. *Id.* ¶ 11.

Honorable Court.”⁵¹ In its response, the state presented its narrative about Operation Defensive Shield. Notably, this narrative was repeated, in almost identical language, in all of the state’s responses to subsequent petitions filed by Adalah in these cases. This narrative, serving as the preamble to the state’s responses, began as follows:

Everyone is aware that since the end of September (2000), there have been numerous combat actions in Judea and Samaria, and that there have been many attacks in these territories and in Israel, which have killed and wounded hundreds of Israelis. Many Palestinians have also been killed and wounded.

These incidents became much more serious in March 2002, when some one hundred and twenty Israeli civilians were killed, and hundreds were wounded, in attacks by Palestinians.

In response to these acts of terror, the government of Israel decided, on 29 March 2002, to conduct an IDF action of broad magnitude to destroy the Palestinian terror infrastructure in its entirety, and to take extensive action until the goal is achieved.

Within the framework of this activity, which began at the end of March 2002, IDF forces entered many areas which were under the control of the Palestinian Authority and ... Palestinian cities, such as Ramallah, Qalqilya, Tulkarem, Nablus, Jenin and Bethlehem, and also Palestinian villages. The IDF forces entered with the objective, *inter alia*, to arrest wanted persons and persons affiliated with different terrorist organizations, and to gather weapons and explosive materials.

In the context of the IDF action, battles are being waged against armed persons, and the IDF has been compelled to call up many army reserve forces and use heavy weapons, such as tanks and armored personnel carriers, and also combat helicopters and planes.⁵²

The hearing lasted nearly an hour. A considerable number of spectators and members of the local media were present. Late in the afternoon of the same day, April 8, the Supreme Court handed down its ruling. The one page ruling, written by Justice Dorner, rejected the two petitions.⁵³ It opened with a summary of the petitioners’ arguments:

51. Response on Behalf of the Respondents, HCJ 2936/02 Physicians for Human Rights v. The Commander of the IDF Forces in the West Bank [2002] IsrSC 56(3) 3.

52. *Id.* ¶¶ 6-10 (emphasis omitted).

53. HCJ 2936/02 Physicians for Human Rights v. The Commander of the IDF Forces in the

In the two petitions that were filed in the midst of IDF combat actions in Operation 'Defensive Shield' taking place in the Palestinian Authority territories, the argument is made – in reference to a number of concrete cases – against IDF forces firing at medical personnel of the 'Red Cross' and the 'Red Crescent' working in ambulances and hospitals. The petitions also argue against the prevention of the evacuation of the wounded and sick to hospitals in order to receive medical treatment, and against the prevention of the evacuation of the bodies of the dead to hospitals and then to burial by their families. Finally, the petitioners argued against the lack of supply of medical equipment for the besieged hospitals. The petitioners claimed that these IDF actions in the territory of the Palestinian Authority violate the rules of international law.⁵⁴

Justice Dorner then summarized the state's response and the conclusions of the court:

As to the merits of the matter, the State agreed that the objective situation relating to the handling of the sick, the wounded, and the bodies of the dead is not easy. The state contends that the difficulty arises from the combat itself, during which it found that in a number of cases, explosives were transported in ambulances and wanted terrorists found refuge in hospitals.

Being unable to relate to the specific events referred to in the petitions, which appear harsh on their face, we emphasize that our combat forces are obligated to comply with the humanitarian rules pertaining to the handling of the wounded, the sick, and the bodies of those who have been killed.

This commitment of our forces, based on law and morality – and, as the State notes, on utilitarian grounds as well – must be presented to the combat forces until it reaches the level of the solitary soldier in the field. This must be done by issuing specific guidelines that will prevent, as far as possible even in difficult situations, actions that do not comply with rules of humanitarian assistance.

The remedy requested in the petitions required the State to provide an explanation. Since an explanation was provided, in which context it was explained that IDF soldiers were instructed to act in accordance with the humanitarian rules, and that they are also

West Bank [2002] IsrSC 56(3) 3.

54. *Id.* ¶ 1.

doing so, the petitions should be dismissed.⁵⁵

The language of publication for Supreme Court rulings is Hebrew. At that time, it was rare for the Court to also publish its rulings in English. However, the Court decided to publish the one-page ruling in English,⁵⁶ and the Israeli Foreign Ministry also later published it in an English book along with several other Supreme Court rulings pertaining to the OPT.⁵⁷

In this case, the petitioners succeeded to document events taking place during the military operation, including victims' names and the circumstances surrounding their injuries or deaths. This documentation was important for many reasons. First, it created a contemporaneous official record before the Court, and served to forewarn the Court of the scope of the human rights violations taking place during the military operations. Second, the case brought these events to the public's attention which was especially important as the army had imposed a total media blackout on the area. Third, the petitions compelled the Attorney General's office to respond. Crucially, the Attorney General did *not* challenge the validity of the facts; rather, the state admitted that it had deployed a large number of soldiers and heavy weapons for the operation including the air forces and combat helicopters. This admission proved to us that the military was using heavy equipment against civilians, and could later be used to demonstrate the disproportionate nature of the military's use of firepower. The Attorney General's response itself thus formed a basis for the future petitions filed to the Supreme Court. The Court's decision partially records the arguments of the two sides. It rejects the petition in an extremely cursory way without detailing its reasoning and the sources of law it relies upon to justify its decision. The Court's decision also shows that the Court is not willing to intervene in the operations of the military in real time.

D. Petition Against the Demolition of Inhabited Homes

In the evening of April 8, immediately following the aforementioned ruling, Adalah filed another petition to the Supreme Court. This petition sought an injunction preventing the destruction of homes in the Jenin refugee camp with no advanced warning and no time for residents to gather their possessions and evacuate their homes.⁵⁸ The presiding justice scheduled a hearing before a panel of three justices, to be held the

55. *Id.* ¶¶ 2-5.

56. HCJ 2936/02 Physicians for Human Rights v. The Commander of the IDF Forces in the West Bank [2002] IsrSC 56(3) 3.

57. See ISRAEL SUPREME COURT, JUDGMENTS OF THE ISRAEL SUPREME COURT: FIGHTING TERRORISM WITHIN THE LAW 68-69 (2005).

58. See Petition for Order Nisi and Temporary Injunction, HCJ 2977/02 Adalah & LAW v. Commander of IDF Forces in the West Bank [2002] IsrSC 56 (3) 6, available at <http://www.adalah.org/eng/optagenda.php>.

following morning, April 9.

On the day of the hearing, the media published news items providing harsh accounts of the military's activity in the Jenin refugee camp. The Ha'aretz newspaper and website reported that then Foreign Minister Shimon Peres was "very worried about the expected international reaction as soon as the world learns the details of the tough battle in the Jenin refugee camps, where more than 100 Palestinians have already been killed in fighting with IDF forces."⁵⁹ Ha'aretz added: "In private, Peres is referring to the battle as a 'massacre'."⁶⁰ Army officers were quoted expressing shock at the way the operation was being conducted. One officer stated: "When the world sees the pictures of what we have done there, it will do us immense damage. However many wanted men we kill in the refugee camp, and however much of the terror infrastructure we expose and destroy there, there is still no justification for causing such great destruction."⁶¹

In the factual background of the petition, Adalah and LAW presented detailed descriptions of reported house demolition procedures:

According to information received by the petitioners from eyewitnesses in the Jenin refugee camp, from residents of Jenin and from the media, army units under the command of the respondent began on Friday, April 5, 2002, to demolish houses in the Jenin refugee camp. So far many tens of houses have been demolished and the demolition continues at the time when this petition is being submitted . . . The demolition of houses is carried out both by bulldozers and by the firing of missiles from helicopters and tanks, with houses being demolished by bulldozers along two routes that divide the camp . . . while the missiles hit houses along these routes as well as other houses in the Jenin refugee camp. The demolition of houses is carried out in an arbitrary manner and damages houses on the aforementioned routes that are inhabited by civilians, including women, children and the elderly, who are not involved in the fighting in any way whatsoever. . . .

[I]n some of the . . . cases residents were given no prior warning or a period of stay to allow sufficient time to leave their houses before the demolition took place; for that reason, some of the residents did not manage to leave the houses before they were demolished. As a result, people were trapped under the rubble causing deaths

59. See Aluf Benn & Amos Harel, *Peres Calls IDF Operation in Jenin a 'Massacre'*, HA'ARETZ (Isr.), Apr. 9, 2002.

60. *Id.*

61. *Id.*

and injuries.⁶²

In its response to the petition, the Attorney General's Office confirmed, as explained by the Court in its ruling below, that bulldozers demolished homes even when their inhabitants were still inside them. It emphasized that, "IDF forces have made sure that they give the inhabitants prior warnings," but noted that "these warnings were only partially successful."⁶³

Deputy Chief Justice S. Levin and Justices Y. Englard and A. Gronis heard the petition on the afternoon of April 9, 2002. The hearing lasted an hour and a half. Hall C, the largest courtroom in the Supreme Court building, was filled with spectators and local and foreign journalists. A sharp confrontation between the judicial panel and the petitioners' attorneys took place at this hearing. This confrontation deviated from conventional courtroom protocol and reached a peak when Justice Levy asked the Adalah attorney whether she thought that the Allied Forces should have given a longer and earlier warning to the residents of Dresden before bombing the city. The attorney responded in the affirmative: indeed, it was impermissible to bomb the homes in Dresden together with their inhabitants.⁶⁴

Later that afternoon, the Court published its two-page ruling.⁶⁵ In an unusual practice, the ruling was signed by all three of the justices on the panel without noting the author. The ruling opened by summarizing the petitioners' arguments:

Two human rights organizations (henceforth: the petitioners) petitioned before us for the issuing of an *order nisi* directed to the Commander of IDF forces in the area of Judea and Samaria (henceforth: the respondent) to show cause 'why he should not refrain from demolishing houses, with no prior warning, without granting the right to a hearing, and without allowing for the evacuation of inhabitants and their possessions from their houses.' The claim of the petitioners is that army units under the command of the Respondent are demolishing houses of the residents at the refugee camp in Jenin by means of bulldozers, missiles from

62. See Petition, *supra* note 58, ¶¶ 1-3, 5.

63. Statement by the State Attorney's Office, State Response ¶ 23 (Apr. 9, 2002), available at <http://www.adalah.org/eng/optagenda.php>.

64. Statements at Hearing, HCJ 2977/02 Adalah & LAW v. Commander of IDF Forces in the West Bank [2002], IsrSC 56 (3) 6, Apr. 19, 2002. The Court did not record a protocol of the hearing, so there is no official documentation of these statements. The author was present at the hearing as one of the petitioners' legal representatives. See also Press Release, Adalah, Supreme Court Rejects Petition Calling on Israeli Army to Stop Demolishing Homes in the Jenin Refugee Camp (Apr. 9, 2002), http://www.adalah.org/eng/pressreleases/02_04_09-4.htm.

65. See HCJ 2977/02 Adalah & LAW v. Commander of IDF Forces in the West Bank [2002] IsrSC 56 (3) 6.

helicopters and tanks. The houses are being demolished by bulldozers along two axes bisecting the refugee camp without giving any prior warning and without granting their owners the right to a hearing and without allowing them time to evacuate; which causes, according to the Petitioners, the demolition of houses on top of their inhabitants and death and injury of people.⁶⁶

The ruling then moved on to record the Attorney General's position and the Court's final decisions:

The Respondent's response stated that at issue is the carrying out of an extensive operation by the IDF aimed at repressing the infrastructure of Palestinian terrorism. Within this operation army forces have also entered the refugee camp in Jenin. It became clear to them that the town, and the refugee camp, were organized as a military compound geared for defense. A large part of the civilian Palestinian population had been evacuated from the houses within the refugee camp and some of the houses had been booby-trapped in preparation for the IDF forces' entry. During the operation the soldiers came up against snipers firing and the setting of houses on fire by means of gas containers placed within them. Many soldiers were hurt. Due to physical and spatial conditions and in order to lessen the risk to the combatants it was necessary also to make use of a bulldozer. Paragraph 13 of the response stated:

'13. According to IDF regulations, the movement of the bulldozer within a built up area is accompanied by a call by proclamation informing the inhabitants that they are to evacuate the houses, as the IDF is advancing with heavy machinery that may damage the houses' walls. The Palestinian inhabitants were given a period of about an hour to an hour and a half between the proclamation and the movement of the bulldozer.'

During the IDF operation in the center of the camp there were houses where people came out following the announcement, and there were houses whose inhabitants did not come out following the announcement, but did come out after the bulldozer had hit one of the house's walls, and before the house was demolished. . . . Under these circumstances, the power of the Court to intervene in operational actions through judicial review is limited. . . . These indeed are not regular and static conditions under which it is appropriate to give those against which action is intended prior notice before harming their property. . . .

The Respondent has presumably – and no arguments to the

66. *Id.* ¶ 1.

contrary have been presented to us – instructed and will instruct the fighting forces to do all that is needed to avoid the possibility of causing unnecessary harm to the innocent.⁶⁷

This petition succeeded in bringing the Israeli military's practice of extensive home demolitions before the Court in a timely manner. It further led the Attorney General to confirm that the military had destroyed homes while their inhabitants were still inside. This conduct amounts to a grave breach of the Fourth Geneva Convention and Additional Protocol I.⁶⁸ As in the first ruling, the court again saw itself as the protector of the army.

E. Petition Against the Bombing of Population Centers and Civilian Targets

Adalah next decided to file a petition against the bombing and shelling of population centers and civilian infrastructure. The petition argued that the bombings were grave breaches of the Fourth Geneva Convention,⁶⁹ and war crimes according to Article 8 of the Rome Statute of the International Criminal Court.⁷⁰ Adalah invited ACRI to join the case as a petitioner, and the organization accepted.

The petition was filed on April 9, 2002. The factual section presented numerous personal stories from victims, while the legal section detailed all of the violations that constituted war crimes under international law.⁷¹ This petition marked the first case to come before the Israeli Supreme Court to conceive of human rights violations as constituting war crimes by the Israeli military, and to explicitly state it.

The petitioners sought a court order to stop the shelling of population centers and civilian targets in the Jenin refugee camp. The petition included testimonies from camp residents about the demolition of their homes not only with bulldozers, but also with helicopters. Some homes were attacked when the inhabitants were still inside and some when residents were even

67. *Id.* ¶¶ 2-4 (emphasis added).

68. The petitioners argued that these acts violated the residents' right to life, to bodily integrity, and to dignity, as protected by Articles 3, 27, 32, 33, and 147 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, and Articles 11, 51, 75, and 85 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I). They also argued that the demolition of the residents' property constituted a violation of Articles 3, 27, 32, 33, and 53 of Geneva Convention (IV) and Article 52 of its Protocol I. Further, they argued that these acts amounted to collective punishment as prohibited by Articles 27 and 33 of the Geneva Convention (IV).

69. Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

70. Rome Statute of the International Criminal Court art. 8, July 17, 1998, UN Doc. A/CONF.183/9*, reprinted in 37 ILM, 999 (1998).

71. See Petition, HCJ 3022/02 LAW – The Palestinian Society. for the Def. of Human Rights & the Env't v. The Commander of the IDF Forces in the West Bank [2002] IsrSC 56(3) 9, available at <http://www.adalah.org/eng/optagenda.php>.

waving white flags. Several of the homes burst into flames, with men, women and children trapped inside. The testimonies also noted that the shelling was directed against civilian buildings, including the Al-Waqala school, the Jenin Hospital, and the Al-Ghazi Hospital. They listed the neighborhoods where homes were demolished, with some of the people still trapped or killed among the ruins. Further, the petition presented testimony about the lack of water and electricity, and the food shortage that lasted several days.

The Attorney General's Office submitted the military's response to the petition on the morning of April 10, prior to the hearing.⁷² This response differed from the previous ones in both its factual and legal explanations; for the first time, the Attorney General's Office responded to concrete facts presented in the petition. However, like the other responses previously submitted, this response did not seek to refute or contradict the main facts presented in the petition. Instead, it sought to provide justification for the military's activities. For example, the military did not deny the use of tanks and helicopters: "In response to the shooting which was aimed at the soldiers, the forces acting in the field were required to respond with gunfire, including by means of tanks and helicopters, accordingly striking the camp's buildings."⁷³ The response also addressed the cutting off of electricity, and the issue of water and food shortages:

In fact, the electric system in the camp was cut by IDF forces which operated in the area. This was done in order to prevent the electrocution of soldiers who were traveling in the alleys. . . . During the days of the battles, understandable difficulties ensued regarding the delivery of water and food to the residents of the camp due to the non-stop exchange of gunfire. ...⁷⁴

The response referred to the evacuation of the dead and injured:

Regarding the argument in paragraph 13 of the petition, throughout the days of fighting, significant difficulties arose in the evacuation of injured persons and in the evacuation of corpses from the refugee camp . . . Despite the above-mentioned difficulties, an effort was made to coordinate the rescue of injured (sic) – an effort that at times did not succeed because of the rescue team's fear of entering a combat area and because of the intensive shooting.⁷⁵

72. See Statement on Behalf of Respondents, HCJ 3022/02 LAW – The Palestinian Society. for the Def. of Human Rights & the Env't v. The Commander of the IDF Forces in the West Bank [2002] IsrSC 56(3) 9, available at <http://www.adalah.org/eng/optagenda.php>.

73. *Id.* ¶ 29.

74. *Id.* ¶ 33.

75. *Id.* ¶ 34.

The response of the Attorney General's Office denied the attack against the hospitals but confirmed the attack on the school:

Regarding the argument in paragraph 11 of the petition, from the respondent's examination, it was found that IDF forces operating in the field did not shell the Jenin and al-Razi hospitals. At the same time, in the area of the school that was mentioned, indeed there were exchanges of gunfire between IDF forces and the terrorists who were hiding in the refugee camp.⁷⁶

In addition, this response included the entire program of demolition carried out by the bulldozers, as presented in the Attorney General's Office previous response pertaining to the demolition of inhabited homes.⁷⁷ This prior response confirmed that the demolitions were sometimes initiated when the inhabitants were still inside their homes.

The hearing took place before Justices D. Dorner, A. Procaccio, and E. Levy. The legal advisor to ACRI appeared together with attorneys from Adalah, who presented the case on behalf of Adalah, ACRI, and LAW [Qanun]. The public's presence, including local and international journalists, had grown larger from petition to petition and from day to day. Again, this hearing was held in the largest hall in the Supreme Court and before a large audience composed of members of both the public and the media. The confrontation between the petitioners' lawyers and the judicial panel was exceptionally sharp in tone.

In the late afternoon of April 10, the Court issued its extremely succinct one-page ruling, written by Justice Dorner. The Court summarized the arguments of the petitioners and the Attorney General's office, concluding that:

The State's threshold argument is accepted by us. We also think that it is not possible both substantively and institutionally to give the remedies requested by the Petitioners. But even regarding the merits of the case, the Petition should be dismissed, because from the State's answer, it appears that the IDF is indeed making efforts in order to prevent or regretfully, to minimize the harm to civilians. Within the scope of these efforts, soldiers have even been killed, and the IDF activity is being carried out protecting the lives of our soldiers under harsh fighting conditions, while as Attorney Yakir himself said, the fighters against us, are holding the civilian population hostage.⁷⁸

76. *Id.* ¶ 32.

77. *Id.* ¶ 13-14.

78. HCJ 3022/02 LAW – The Palestinian Society for the Def. of Human Rights & the Env't v. The Commander of the IDF Forces in the West Bank [2002] IsrSC 56(3) 9.

In writing this short ruling, Justice Dorner twice chose to note that the legal advisor of ACRI argued that the civilian population in Jenin camp was being held hostage by the fighters inside.⁷⁹ The petitioners' attorneys vehemently disagreed with the Court's characterization of the attorney's statements, and immediately filed a request to the Court to correct its ruling. On April 14, 2002, the Supreme Court rejected the request, claiming, "this motion is not understood by us. The Court's opinion correctly reflects the words of Attorney Dan Yakir before us."⁸⁰

This case marked the first petition that ACRI submitted jointly with the coalition consisting of Adalah and other Palestinian human rights organizations. Here we see that the court did not deny the fact that civilians are attacked, however it fully accepted the army's claims that the Palestinian fighters used civilians as human shields. In this case, one might expect that the court would emphasize the absolute distinction between civilians and combatants, and balance this distinction by putting boundaries and limitations on the army to avoid further harm to the civilians. Notably, as well, the court did not offer any remedy to protect the civilians.

F. Petition Against the Mass Burial of the Dead

On April 12, the media reported that the military planned to conduct a mass burial of the dead from the Jenin refugee camp. According to these reports, the military intended to transfer the bodies to an unknown location, without identifying them.⁸¹ Based on this general information, which was not confirmed by personal testimony, Adalah contacted the Attorney General's Office and demanded that the military refrain from carrying out these actions. This urgent request was not answered.⁸²

Adalah immediately decided to submit a petition to the Supreme Court. Adalah contacted Arab members of the Knesset and, subsequently, a decision was made to file three petitions simultaneously on a Friday afternoon.⁸³ The petitions sought to prevent the dead from being buried

79. *Id.* ¶¶ 4, 5.

80. Rejection of Motion to Correct Ruling, HCJ 3022/02, LAW – The Palestinian Society. for the Def. of Human Rights & the Env't v. Commander of IDF Forces in the West Bank [2002] IsrSC 56(3) 9.

81. Amos Harel, Anat Cygielman & Amira Hass, *IDF Decided to Bury the Bodies of Those Killed in Jenin*, HA'ARETZ (Isr.), Apr. 12, 2002 ("The IDF today plans to bury the bodies of the Palestinians killed in the camp . . . Army sources said that the IDF has not yet taken any action in regard to burying the bodies. The dead who are identified as civilians will be transferred to the hospitals in Jenin and later to burial, while those identified by the IDF as terrorists will be buried in a special cemetery in the Jordan Valley.").

82. See Adalah Petition, HCJ 3116/02, Adalah & LAW [Qanun] v. Commander of IDF Forces in the West Bank ¶¶ 3, 9(a) [2002], available at <http://www.adalah.org/eng/optagenda.php>.

83. HCJ 3114/02 MK Mohammed Barakeh v. The Minister of Defense [2002] IsrSC 56(3) 11; HCJ 3115/02, MK Ahmed Tibi v. Prime Minister Ariel Sharon; HCJ 3116/02, Adalah & LAW [Qanun] v. Commander of IDF Forces in the West Bank [2002].

without identification, to enable medical teams of the PRC and the ICRC to enter the camp in order to evacuate the bodies to hospitals, and to assist the families of the deceased in providing their loved ones with a proper and dignified burial. Immediately after the petitions were filed, the Supreme Court requested a prompt response from the Attorney General's Office, which was indeed submitted by Friday evening. The Supreme Court then issued a temporary injunction preventing the evacuation of the dead until a hearing could be conducted. The hearing was scheduled for April 14 before a panel of three justices.⁸⁴

The Attorney General's Office stated in its response to the petition that "[o]nce IDF troops assumed control over the Jenin refugee camp, the bodies of Palestinians remained there, and could not be removed until complete control was achieved. . . ."⁸⁵ The response also noted that the IDF feared that some of the bodies had been booby-trapped and that after the bodies had been checked, the IDF authorities would communicate with the relevant Palestinian officials to coordinate their transfer for immediate burial. If this coordination effort did not succeed, the army authorities would consider burying the bodies themselves.⁸⁶

The Supreme Court hearing lasted nearly two and a half hours. The courtroom was packed with journalists from all over the world. Leading television networks, broadcasting in various languages, including correspondents from the Arab world, came to the hearing. This time, the hearing was conducted by then Chief Justice Aharon Barak, together with Justices T. Or and D. Beinisch (the current Chief Justice). In contrast to the previous hearings, Chief Justice Barak set a less acrimonious tone, with the court respecting the right of the parties to present their arguments. During the hearing, he asked the parties to reach an agreement regarding burial procedures. He also succeeded (and this would be expressed in his ruling) in limiting the discussion of the case to procedural matters, instead of focusing on issues of principle.

Later that afternoon, the ruling was issued; it was longer than any of the previous rulings, stretching over six pages and it also differed in style from the others. Unlike the previous opinions, which all began with the petitioners' arguments, this ruling opened with a narrative that sought to justify or explain the Israeli military's entry into the Jenin refugee camp. The three prior rulings distinguished between the respondents' arguments and the Court's position. Chief Justice Barak's ruling underplayed this distinction; in many places, he presented matters as factual determinations of the court. For example, the court even chose to raise certain issues on its own initiative even though they did not require a ruling and were not mentioned at the hearing:

84. HCJ 3114/02 Barakeh v. The Minister of Defense [2002] IsrSC 56(3) 11 ¶¶ 4-5.

85. Immediate Response on Behalf of the State Attorney's Office, HCJ 3114/02 Barakeh v. The Minister of Defense [2002] IsrSC 56(3) 11 ¶ 12, available at <http://www.adalah.org/eng/optagenda.php>.

86. *Id.* ¶¶ 14-18.

Petitions claimed that a massacre had been committed in the Jenin refugee camp. Respondents strongly disagree. There was a battle in Jenin, a battle in which many of our soldiers fell. The army fought house to house and, in order to prevent civilian casualties, did not bomb from the air. Twenty three IDF soldiers lost their lives. Scores of soldiers were wounded. Petitioners did not satisfy their evidentiary burden. A massacre is one thing; a difficult battle is something else entirely. Respondents repeat before us that they wish to hide nothing, and that they have nothing to hide. The pragmatic arrangement that we have arrived at is an expression of that position.⁸⁷

Only after presenting the narrative of Operation Defensive Shield and the military incursion into the Jenin refugee camp as factual determinations of the court, Chief Justice Barak presented a summary of the remedies requested by the petitioners.⁸⁸ The ruling also included information obtained during the court hearings that was not previously revealed by the official authorities or the military. It also presented this information as a factual determination of the court: "Bodies of Palestinians remained in the camp . . . As of the submission of these petitions, thirty seven bodies had been found. Eight bodies were transferred to the Palestinian side. Twenty six bodies have yet to be evacuated."⁸⁹

Chief Justice Barak ruled on the merits of the petition as follows:

7. Our starting point is that, under the circumstances, respondents are responsible for the location, identification, evacuation and burial of the bodies. This is their obligation under international law . . . Respondents accept this position . . . We recommended that a representative of the Red Crescent be included subject, of course, to the judgment of the military commanders . . . Identification activities on the part of the IDF will include documentation according to standard procedures. These activities will be done as soon as possible, with respect for the dead and while safeguarding the security of the forces. These principles are also acceptable to petitioners.

8. At the end of the identification process, the burial stage will begin. Respondents' position is that the Palestinian side should perform the burials in a timely manner. Of course, successful implementation requires agreement between the respondents and the Palestinian side. . . . Though it is unnecessary, we add that it is respondents' position that such burials be carried out in an appropriate and respectful manner, while ensuring respect for the

87. HCJ 3114/02 Barakeh v. The Minister of Defense [2002] IsrSC 56(3) 11, ¶ 11.

88. *Id.* ¶ 4.

89. *Id.* ¶ 3.

dead. No differentiation will be made between bodies, and no differentiation will be made between the bodies of civilians and the bodies of armed terrorists. Petitioners find this position acceptable.⁹⁰

Chief Justice Barak stated in conclusion: "In light of the arrangement detailed above, which is acceptable to all parties before us, the petitions are rejected."⁹¹ The ruling frequently noted the subject of "understandings" between the parties as a basis for the decision.⁹² Finally, Chief Justice Barak wrote what has become one of his most quoted statements: "Even in a time of combat, the laws of war must be followed. Even in a time of combat, all must be done in order to protect the civilian population."⁹³ The Israeli Foreign Ministry also published this ruling in English in its book of judgments.⁹⁴

Two days after the ruling was issued, Adalah submitted a request to the Supreme Court to hold an additional proceeding on this case, arguing that the military was refusing to cooperate with representatives of the PRC and hand over the bodies to the Palestinians; the Supreme Court rejected the request.⁹⁵

On April 18, 2002, the Israeli military pulled out of the Jenin refugee camp.

This fourth decision showed more than any of the other prior rulings that the Supreme Court perceived its status not only as a national court but also as a court which should address the international community. As will

90. *Id.* ¶¶ 7-8.

91. *Id.* ¶ 12.

92. For example, "Indeed, there is no real dispute between the parties" *Id.* ¶9, and "Indeed, it is usually possible to agree on humanitarian issues. Respect for the dead is important to us all" *Id.* ¶ 10; "It is good that the parties to these petitions have reached an understanding. This understanding is desirable. It respects the living and the dead." *Id.* ¶12.

93. HCJ 3114/02 Barakeh v. The Minister of Defense, IsrSC [2002] 56(3) 11, ¶ 12.

94. See ISRAELI SUPREME COURT, *supra* note 57, at 71.

95. The decision states:

Our ruling (of April 14, 2002) explains the responsibility of the respondent for all stages locating, identifying, evacuating and burying. Paragraph 7 of the ruling elaborates the various stages of performing the required processes. The announcement submitted by the state to us today says that during these very hours contacts are being held between representatives of the IDF and representatives of the Red Cross and Red Crescent in regard to locating the bodies and documenting the findings prior to handing over the bodies to the Palestinian entities for burial. We hope that these contacts will succeed and that it will be possible to continue the humanitarian actions as stipulated in our ruling. In these circumstances, there is no cause to conduct an additional proceeding at this stage.

HCJ 3116/02, Adalah & LAW [Qanun] v. Commander of IDF Forces in the West Bank [2002] (Ruling On Request for Additional Proceedings, Apr. 16, 2002) (Author's translation), available at <http://elyon2.court.gov.il/files/02/160/031/A02/02031160.A02.htm>.

be explained below, the courtroom during this period was transformed into a transnational arena, in which all the parties had an interest in speaking to international actors including the international legal community, the United Nations and the international media in order to influence their perception of the military's operations.

G. The Warning and Documentation of Human Rights Violations via Legal Proceedings

Transnational lawyers seek to use legal proceedings to warn the judiciary and the public of human rights violations, and also to document them. Transnational law made it possible for the lawyers behind the series of petitions brought by Adalah to bring the relevant facts before the court. These facts gave rise to a legal argument alleging grave breaches of the Fourth Geneva Convention and commission of war crimes under the Rome Statute.

The lawyers for the petitioners did not expect the court rulings to adopt the narrative of the victims, and in fact, they did not. On the contrary, these rulings emphasized the difficulties faced by the Israeli soldiers in the Jenin refugee camp and also highlighted the military's commitment to the rules of international humanitarian law. In the first paragraph of his ruling, Chief Justice Barak documents the terror attacks that took place in the State of Israel, which killed many Israeli civilians. Many of these attacks, according to this opinion, were conducted by Palestinians from the Jenin refugee camp.⁹⁶ If the lawyers for the petitioners expected the court to level criticism against the military's conduct in the Jenin refugee camp, these expectations also proved to be unfounded.

Nonetheless, from the standpoint of Adalah's goals, these rulings together with the written arguments in the petitions present facts constituting a partial documentation of the massive harm suffered by the Palestinian civilian population. None of the judicial opinions contained a general denial or substantially contradicted the facts presented in the petitions. In fact, these rulings focus solely on providing explanations or justifications of the military's actions.

A reading of all the Israeli official legal documents – the state's responses and the court's rulings – can, therefore, reinforce the following: the Israeli army entered the Jenin refugee camp and “use[d] heavy weapons such as tanks and armored personnel carriers, and also attack helicopters and planes.”⁹⁷ Many Palestinian civilians were killed and injured during the incursions. The possibility of timely evacuation of the dead and wounded was not provided. Many bodies remained in the camp

96. HCJ 3114/02 Barakeh v. The Minister of Defense [2002] IsrSC 56(3) 11, ¶1.

97. Immediate Response on Behalf of the state Attorney's Office ¶ 7, HCJ 3114/02 Barakeh v. The Minister of Defense [2002] IsrSC 56(3) 11, available at <http://www.adalah.org/eng/optagenda.php>.

without evacuation for a long period of time. The same held true for the injured. The Attorney General's Office confirmed that the military bombed civilian targets within the Jenin refugee camp with tanks and planes. The electrical grid in the Jenin camp was bombed; the school was bombed; and there was an ongoing shortage of water and food. The army also demolished homes. The army claimed, *inter alia*, that the homes were demolished in order to clear a path for the soldiers, since the alleys of the camp are narrow; that is, it admitted that the destruction was arbitrary and systematic. The army claimed that it called to people to leave their homes, but that some of the residents failed to heed these calls.⁹⁸ The army's bulldozers began to demolish homes even with the inhabitants still inside them.⁹⁹ In all of these cases, petitions were filed while these military activities were ongoing. The Israeli Supreme Court dismissed all the petitions, and accepted and affirmed the military's version of events.

Undoubtedly, this reading of the legal documents is reasonable as it is supported by the written filings and record. Nonetheless, it is arguably a partial reading because the court also explained and described the difficulties encountered by the soldiers. Yet these seemingly pro-military descriptions reflect a different issue, namely an attempt to provide justifications for the military's actions. These parts of the opinions do not call into question the actual historical occurrence of the military actions, which is what interests the transnational lawyers. Here, a transnational lawyer will argue that the realm of justifications is not the heart of the matter, because it is an "Israeli justification" for Israeli military activity that harmed a Palestinian civilian population.

H. Communicating with the Local Public and the International Community

Through the use of local law and transnational law, transnational lawyers seek to provide information to the public, the media and international fora about flagrant human rights abuses. In essence, these lawyers hope to utilize local legal proceedings to generate a wide public debate even beyond national boundaries.

An examination of Adalah's outreach reveals that the organization made a great deal of effort from the outset to bring information to the public via the media in a consistent and systematic way not only in Arabic or Hebrew, but also in English. In general, Adalah's press releases sought to highlight two events: the legal event (that is, the type of legal appeal or

98. The Court's ruling also confirms, "As IDF forces arrived, they issued a general call to the residents to come out of their houses. According to information we have received, the appeal was not heeded." HCJ 3114/02 Barakeh v. The Minister of Defense. [2002] IsrSC 56(3) 11, ¶ 2.

99. Chief Justice Barak's ruling also confirms that "according to respondents, during the fighting, after calls to evacuate the houses, bulldozers were deployed to destroy the houses, and in the course of the fighting some Palestinians were killed." *Id.* ¶ 2.

legal proceeding) and the military event being challenged. We used the legal actions as catalysts, spurring parties such as the Attorney General's office or the military to prepare official responses and answer to our arguments. Our press releases reporting on these events sought to attract and heighten public attention at both the local and international levels to scrutinize the courts' response, as well as the military actions.

The legal proceedings in these cases received wide media coverage. For this Note, I reviewed the coverage in the *Ha'aretz* and *Jerusalem Post* newspapers. The choice was not coincidental. *Ha'aretz* is published in Hebrew and English. The English edition generally publishes news items of interest to an international audience. The *Jerusalem Post*, the oldest newspaper in Israel, is published in English and also reaches an international audience. I do not focus here on all news concerning the events in Jenin; rather, the focus is only on news coverage of the legal proceedings relevant to this Note.

A search of the *Ha'aretz* (Israel) archive for the period of April 3, 2002 to mid-May 2002 found 27 items that mentioned Adalah's legal actions directly or indirectly, sometimes alone and sometimes in conjunction with other human rights organizations.¹⁰⁰ Of these items, 14 were news reports and the remainder can be classified as commentaries or editorials. *Ha'aretz* also published many of the items about Adalah's petitions in its English edition. All of the petitions brought before the court during this period received at least some news coverage; most received coverage at the time they were filed and after the Supreme Court dismissed them. Some of the petitions received news coverage prior to a court hearing, such as: *Supreme Court to Discuss Today Evacuation of Bodies of Palestinians in Jenin*.¹⁰¹ Many items also quoted the positions presented by the Attorney General's office on behalf of the army in response to the petitions, such as "*IDF: Burial of Bodies in Jenin Depends on Agreement*."¹⁰² Some of the news items were reported under headlines that reflected – and were maybe even responding to – the documentation-producing legal strategy of the petitioners, for instance: *Supreme Court: IDF Authorized To Demolish Homes During Combat Without Warning*.¹⁰³

The Israeli media, including *Ha'aretz*, generally expresses strong support for the military and its operational activity, especially during such periods such as Operation Defensive Shield.¹⁰⁴ Notably, however, some journalists wrote a few articles that leveled criticism, at the judicial system and its failure to provide legal remedies to protect Palestinian civilians. The

100. This information was retrieved from the *Ha'aretz* (Isr.) archive on Oct. 16, 2007.

101. Amos Harel & Jalal Bana, *Supreme Court to Discuss Today Evacuation of Bodies of Palestinians in Jenin*, HA'ARETZ (Isr.), Apr. 14, 2002.

102. Anat Cygielman & Moshe Reinfeld, *IDF: Burial of Bodies in Jenin Depends on Agreement*, HA'ARETZ (Isr.), Apr. 15, 2002.

103. Moshe Reinfeld, *Supreme Court: IDF Authorized to Demolish Homes During Combat Without Warning*, HA'ARETZ (Isr.), Apr. 10, 2002.

104. See DANIEL DOR, *THE SUPPRESSION OF GUILT: THE ISRAELI MEDIA AND THE REOCCUPATION OF THE WEST BANK* (2005).

most salient example of critical articles was written by Joseph Algazy, and published following the hearings on the April 15 petitions under the headline: "*During Combat, Judicial Review Cannot be Exercised or Effective Remedies Provided.*"¹⁰⁵ This article harshly criticized the Supreme Court's conduct regarding these petitions and quotes statements written by the Attorney General's office to note the gravity of the court's decisions. Algazy began his article by quoting directly from the Supreme Court's decision reproduced above in the case challenging home demolitions.¹⁰⁶ Specifically, he quoted the section describing how some demolitions were initiated while residents were still in their homes. He went on:

These lines are not taken from a petition filed by a human rights organization to the court in Israel, but rather from the Attorney General's Office response to a petition submitted last week by Adalah and Qanun (LAW). . . . The justices' main argument was that in many cases the Supreme Court cannot exercise judicial review of operational activity.¹⁰⁷

Aryeh Dayan reported on the petitions in *Ha'aretz*:

During the past two weeks, human rights organizations have received reports about dozens of cases of damage to Palestinian health services: the shelling of hospitals, the destruction of dialysis rooms. . . . In a petition to the Supreme Court, the organizations argued that this reflected an intentional policy of destroying the health infrastructure in the Palestinian Authority. The Supreme Court, as it had done since the fighting began, dismissed the petition.¹⁰⁸

Among the articles supportive of the Supreme Court, an article by Professor Yoav Dotan of the Hebrew University Faculty of Law, is particularly noteworthy. In this article, published on April 21, 2002 in *Ha'aretz* under the headline "*The Jerusalem Branch of Adalah*," he chose to level criticism against the Association for Civil Rights in Israel (ACRI), primarily because of its participation in the petitions. Dotan argued:

Since the IDF entered the territories of the Palestinian Authority, a

105. Joseph Algazy, *During Combat, Judicial Review Cannot be Exercised or Effective Remedies Provided*, HA'ARETZ (Isr.), Apr. 15, 2002.

106. HCJ 2977/02 Adalah and LAW v. Commander of IDF Forces in the West Bank [2002] IsrSC 56 (3) 6.

107. Algazy, *supra* note 105. See also Amira Hass, *Voices from Jenin: A Series of Telephone Conversations Testifies to Some of the Week's Events in Jenin*, HA'ARETZ (Isr.), Apr. 6, 2002 (relying on testimonies collected by Adalah's attorneys and presented to the court).

108. Aryeh Dayan, *The Teams Were Ordered to Crawl Toward the Tanks*, HA'ARETZ (Isr.), Apr. 18, 2002.

series of radical action organizations initiated an 'offensive' of Supreme Court petitions against each step taken in the territories . . . Disappointment awaited anyone who expected the Association to make any attempt to differentiate itself from this coalition by exercising extra caution in thoroughly examining the facts or by reducing the number of petitions to the Supreme Court.¹⁰⁹

Attorney Yuval Albashan, then a lecturer at the Academic Center of Law and known in Israel as a human rights activist, declared:

It was not that there was a slight chance. The chance that the petitions would be granted was non-existent and the Association participated, in effect, in a propaganda war against the state. The petitions were not smart – they undermined the credibility of the Supreme Court, which is a central pillar in advancing human rights, and generated a public dispute, which is also detrimental to activity on behalf of human rights.¹¹⁰

Professor David Kretzmer of the Hebrew University Faculty of Law had a different view towards legal activity of the human rights organizations:

During times of crisis, people do not want to hear criticism about us not being the best and the most moral. This combines with the feeling that the entire world is against us; and then the first reaction is that we need, first of all, to defend the state. But the importance of activity on behalf of human rights is precisely during a time of crisis, like the one we are in now. The people living now will later look back and say to themselves that they don't understand how they did what they did. This is how it was at the beginning of the Lebanon War, when anyone demonstrating against it was considered a traitor and only later people understood how wrong they were.¹¹¹

The *Jerusalem Post* published six news articles about the petitions and the legal proceedings. These articles noted the parties' positions and the Supreme Court's decisions. One feature article stands out in that it addressed the role of the court and the role of human rights organizations in a comprehensive way. The article was published on May 3, 2002 under

109. Yoav Dotan, *The Jerusalem Branch of Adalah*, HA'ARETZ (Isr.), Apr. 21, 2002. Two short articles were published in response to Dotan's article: Tomer Popper, *When the Rights Crossed the Line*, HA'ARETZ (Isr.), Apr. 25, 2002 and Shalom (Shuli) Dichter, *Caution: Danger of Treason*, HA'ARETZ (Isr.), Apr. 25, 2002.

110. Ruth Sinai, *Human Rights Association Strays From the Consensus*, HA'ARETZ (Isr.), Apr. 25, 2002.

111. *Id.*

the headline "*On the Home Court*."¹¹² The headline reflects the content of the article, which noted that unlike cases in the past, human rights organizations did not wait for proceedings to be initiated at the international level. Instead, they brought their claims of human rights violations, based in international law, before the court at home, immediately and while the events were occurring.

More than any previous military operation in Israel's history, Operation Defensive Shield has been accompanied by allegations of serious human rights abuses and even war crimes – allegations that are being heard in both the international and domestic arenas. . . . Cooperating extensively, many of the petitions have been submitted by four or five human rights organizations together, reflecting a consensus among these groups that the IDF has engaged in gross humanitarian and human rights violations.¹¹³

As noted, Adalah also published its press releases in English, and as such, Adalah's attorneys served as a source of information for journalists from around the world. During this period, Adalah attorneys were also interviewed by many of the leading international media outlets. The last petition, which led to the issuance of a temporary injunction on April 12, was particularly widely covered and discussed by international TV news channels, including the BBC, CNN, and Al-Jazeera.

Most important, however, was Adalah's work with international groups and in particular the United Nations. Adalah provided the United Nations with all of its original legal documents, which detailed the organization's findings during the relevant period. On April 16, 2002, the United Nations Commission on Human Rights urged the High Commissioner on Human Rights, Mary Robinson, to submit an immediate report on the situation in the OPT.¹¹⁴ This decision followed the High Commissioner's notification to the Commission on Human Rights that the government of Israel prohibited her delegation from entering Israel or the OPT.¹¹⁵ In her April 24, 2002 report, the High Commissioner refers to Adalah's pre-petition to the Attorney General when discussing the Israeli military use of human shields.¹¹⁶ Further, she referenced the petition filed

112. Eetta Prince-Gibson, *On the Home Court*, JERUSALEM POST (Isr.), May 3, 2002.

113. *Id.*

114. Comm'n on Human Rights Declaration, *Situation in the Occupied Palestinian Territory*, U.N. Doc. E/CN.4/DEC/2002/103, E/CN.4/2002/L.11/Add.7 (Apr. 16, 2002), available at <http://unispal.un.org/UNISPAL.NSF/5ba47a5c6cef541b802563e000493b8c/679bbf665632a59e85256bb9004b8520?OpenDocument>.

115. See Press Release, Commission on Human Rights, Debate Continues on Civil and Political Rights (Apr. 16, 2002) available at <http://unispal.un.org/UNISPAL.NSF/22f431edb91c6f548525678a0051be1d/d0cd5172fe92d45485256b9d006ba3e1?OpenDocument>.

116. ECOSOC, *supra* note 32, ¶ 23 ("On April 18, 2002, Adalah sent a pre-petition to the State Attorney's Office demanding that it compel the IDF to stop using Palestinian civilians as human shields in military operations.").

on April 8, 2002 against both the prevention of the evacuation of the dead and wounded to hospitals and the provision of medical assistance.¹¹⁷

The High Commissioner's report did not set out to investigate the events of the Jenin refugee camp in a comprehensive way. A United Nations General Assembly Resolution of May 7, 2002 stipulated that the Secretary-General of the United Nations, Mr. Kofi Annan, would prepare a comprehensive report that primarily addressed the Jenin events.¹¹⁸ However, the government of Israel also prohibited the delegation of the United Nations Secretary-General from visiting the OPT. The United Nations Secretary-General's report, submitted on July 30, 2002, begins by noting: "The report was written without a visit to Jenin or the other Palestinian cities in question and it therefore relies completely on available resources and information, including submissions from five United Nations Member States and Observer Missions, documents in the public domain and papers submitted by non-governmental organizations."¹¹⁹

While it is difficult to determine precisely how the legal documents submitted by Adalah were put to use, many descriptions in the report indicate that Adalah's documents were indeed used extensively. The report also used the Attorney General's submissions to the Israeli Supreme Court in response to the petitions to describe the method of demolishing inhabited homes,¹²⁰ as well as many other quotes from official sources that emerged during the litigation.¹²¹

This section has shown that although there was little chance that the Israeli Supreme Court would accept the petitions, there were nevertheless important reasons for filing them; notably, the public and international discussion that they could generate. Indeed, the submission of the petitions

117. *Id.* ¶ 37 ("On April 8, 2002, the Israeli High Court dismissed petitions filed by human rights organizations challenging the IDF's prevention of access to medical treatment for the sick and wounded; restriction of access of medical personnel and transport to the areas; and obstruction of the right to bury the dead in a respectful manner.").

118. See G.A. Res. ES-10/10, U.N. Doc. A/RES/ES-10/10 (May 7, 2002), available at <http://unispal.un.org/UNISPAL.NSF/0/72DA83FF10657C9985256BC2005B8D23>.

119. The Secretary-General, *Report of the Secretary-General Prepared Pursuant to General Assembly Resolution ES-10/10*, Summary, ¶ 2, U.N. Doc. A/ES-10/186, (Aug. 1, 2002), available at <http://www.un.org/peace/jenin/>.

120. *Id.* ¶ 64. ("Many of the reports of human rights groups contain accounts of wounded civilians waiting days to reach medical assistance, and being refused medical treatment by IDF soldiers. In some cases, people died as a result of these delays. In addition to those wounded in the fighting, there were civilian inhabitants of the camp and the city who endured medication shortages and delays in medical treatment for pre-existing conditions. For example, it was reported on April 4 that there were 28 kidney patients in Jenin who could not reach the hospital for dialysis treatment.").

121. *Id.* ¶ 65. ("The functioning of Jenin Hospital, just outside the camp, appears to have been severely undermined by IDF actions, despite IDF statements that 'nothing was done to the hospital.' The hospital's supplies of power, water, oxygen and blood were badly affected by the fighting and consequent cuts in services. On 4 April, IDF ordered the Palestinian Red Crescent Society (PRCS) to stop its operations and sealed off the hospital. Hospital staff contend that shells and gunfire severely damaged equipment on the top floor and that at least two patients died because of damage to the oxygen supplies. None of the Palestinians within the hospital was permitted to leave until 15 April.").

galvanized a profound debate about the scope of the human rights violations, the role of the Israeli Supreme Court in protecting the human rights of Palestinian civilians during Israeli military operations, and the definition of war crimes. In addition, the petitions generated useful information for the United Nations, whose representatives were neither present in the field at the time of the events nor permitted to visit Jenin thereafter for the purposes of investigation.

I. Legal Resistance and the Question of Legitimation

In these cases, transnational lawyers utilized transnational law as the substantive law governing their lawsuits while they used Israeli law procedurally. The reliance on transnational law expanded their range of legal resistance beyond the borders of Israeli law. Transnational law enabled the attorneys to file the petitions despite the fact that local law offered no chance of success, providing the legal basis without which the petitions would have been summarily dismissed.

The invocation of transnational law is so powerful and legitimizing in the human rights community that it spurred ACRI to join the petitions, despite the political risks it took vis-à-vis the Jewish Israeli public. Had the lawyers not utilized transnational law, their professional standing, as well as that of their organizations, may have been damaged. By stimulating a public debate and international criticism, the petitions constituted an act of legal resistance by opposing accepted conventions about filing petitions, the judicial policy of the Court and the existing balance of power.

Adalah attorneys sought to warn of and deter human rights abuses through the use of transnational law. The Supreme Court is not indifferent to the international legal community; on the contrary, it often seeks to address international actors and international public opinion. The Court's decision to translate two of the four rulings into English, something it rarely does, testifies to this concern as well as the widespread local and international media coverage of these cases. The Court sought to defend the Israeli military while concurrently seeking to protect its international standing as a court that conducts fair and just proceedings. The lawyers as well as the Supreme Court justices were well aware of the transnational status accorded to the local courtroom during these proceedings.

In these cases, the Supreme Court functioned almost as a public relations branch of the military by repeatedly referring to the military's obligations under international law, while noting that the military was operating in accordance with these obligations.¹²² It did not distance or

122. See, e.g., HCJ 2936/02 Physicians for Human Rights v. The Commander of the IDF Forces in the West Bank [2002] IsrSC 56(3) 3 ("The explanation having been given, wherein it was clarified that IDF soldiers have been instructed to act according to humanitarian law, and that they are indeed so acting, the petition is rejected."); HCJ 3114/02 MK Mohammed Barakeh v. The Minister of Defense [2002] IsrSC 56(3) 11 ("Even in a time of combat, the laws of war must be followed. Even in a time of combat, all must be done in order to protect the

detach itself in any way from the military. The two rulings written by Justice Dorner speak in the national “we” that includes the Court and the military as a single national unit.¹²³ The Court’s repeated use of the term “our forces” in such short texts indicates that the Court did not seek to conceal its allegiances.

In contrast, Chief Justice Barak’s ruling in the fourth petition, which sought to rely “on understandings between the sides,” was more outward-looking than the other decisions. In this ruling, he engaged in expansive rhetoric, however he also accepted the state’s entire response to the concrete legal dispute as fact.

The Court sought to accommodate the urgency of the proceedings by holding hearings within 24 hours of the filing of the petitions. The Attorney General’s office responded in writing to the petitions and the Court granted an opportunity for the petitioners to present their arguments. Moreover, the Court issued a temporary injunction in the fourth petition prohibiting the military from taking any action with regard to burying the bodies until a court hearing was held. Failing to hear petitions raising allegations of war crimes would have been severely damaging to the Court’s standing, particularly internationally. It can be assumed, especially with regards to the last petition argued before Chief Justice Barak, that the justices and the petitioners’ attorneys understood their roles and their declarations as transcending the narrow courtroom, and as having a wider global impact. They knew that they were addressing questions that had drawn the attention of the entire international community.

Did the Supreme Court succeed in legitimizing the military’s actions? It would be a mistake to conclude that the Court’s rulings reinforced the Israeli public’s belief in the correctness of the military’s position. As noted above, the Israeli public largely supported the military campaign, regardless of the Supreme Court’s decisions. Members of the Israeli elite who are engaged in public legal discourse strongly criticized ACRI’s participation in these cases, which they perceived to be damaging the status of the Supreme Court. ACRI’s participation might indicate to the international community that the Supreme Court failed to protect the Palestinian civilian population. The words of Chief Justice Aharon Barak suggest that he at least believed that the Court did not fulfill its duty when, in a *Jerusalem Post* article published at the time, he lamented that “[t]hese are not pretty days for human rights.”¹²⁴

International criticism of Operation Defensive Shield abounded. The United Nations Secretary General’s report noted harsh findings regarding the military’s conduct during the operations.¹²⁵ The abundance of

civilian population”).

123. See HCJ 2936/02 Physicians for Human Rights v. The Commander of the IDF Forces in the West Bank [2002] IsrSC 56(3) 3; HCJ 3022/02 LAW – The Palestinian Society for the Def. of Human Rights & the Env’t v. The Commander of the IDF Forces in the West Bank [2002] IsrSC 56(3) 9.

124. See Prince-Gibson, *supra* note 112.

125. The Secretary-General, *supra* note 119.

documentation that eventually emerged through the series of legal proceedings was in stark contrast with the limited – if not completely absent – judicial intervention. Few observers could conclude that justice was done for Palestinian victims in the Israeli Supreme Court.

The problem of legitimation may arise if victims begin to believe that they have had their day in court, have been afforded the opportunity to seek proper legal remedy, or if they internalize the justifications brought forward for the violation of their rights. Therefore, the question of legitimation should be examined from the victims' perspective and not from that of their oppressors. Given this understanding of legitimation, it is difficult to argue that the Supreme Court's dismissal of the cases legitimized the military attacks on Palestinian civilians in the Jenin refugee camp. If anything, these four decisions stand in stark contrast with the conclusions reached by the United Nations reports, and only reinforce the perception that the Supreme Court failed to provide a domestic legal remedy for Palestinian victims.¹²⁶

III. CONCLUSION

The case study on transnational lawyering presented in this Note, through the four petitions brought before the Israeli Supreme Court *during and against ongoing military attacks*, shows that despite the fact that the lawyers knew that the Court would dismiss the cases, their lawsuits would serve a role that would transcend the immediate legal outcomes. The lawyers brought the cases at a time when there was no access to the victims in the Jenin refugee camp. Relying on international law and raising for the first time *prima facie* charges of war crimes before the Israeli Supreme Court compelled the Court to immediately hear the cases. The initiation of the legal proceedings also compelled the Attorney General to respond to the arguments and the Court to promptly deliver its own decisions. The dismissal of the cases became a persuasive argument for the lawyers in the international arena regarding the lack of an effective local remedy for the civilian victims. The legal proceeding created a historical record of the gross violations of human rights that was also used by United Nations fact-finders and initiated significant public debate.

Further, while the transnational lawyers also sought to address the international community through the legal proceedings, the Supreme Court itself was not indifferent to the international dimension of these proceedings. The Court also tried to use the hearings to influence the international community and to legitimize the military's operation. All the parties involved in these cases, the petitioners, the state attorneys, the military authorities, and the Supreme Court justices, recognized that the

126. See Virtual Roundtable, *Should Human Rights Organizations Continue to Petition the Israeli Supreme Court Concerning the Occupied Palestinian Territory (1967)?*, ADALAH NEWSLETTER, (Adalah, Haifa, Israel) Vol. 45, Feb. 2008, available at <http://www.adalah.org/newsletter/eng/feb08/roundtable/roundtable.html>.

national courtroom had been transformed into an international arena and that the proceedings would have an effect that would go significantly beyond the actual judicial opinions that were delivered. Transnational lawyering succeeded in these cases by initiating legal proceedings in order to break the silence imposed by authorities; to resist the legal consensus against litigating the military's operations during the attacks themselves; and to compel the army and the Attorney General to respond to victims, the Court, and the public about the military's actions. These legal proceedings also gave the media opportunity and access that enabled the inclusion of victims' voices and fomentation of public debate about the military's operations. The four petitions and the advocacy work that accompanied them generated official responses and Court opinions that provided a record that was then relied upon by international investigative bodies. Despite limited access and an aggressive public relations campaign led by the Israeli military to muzzle the press and human rights organizations, lawyers succeeded in generating a public record and public debate about these abuses through their legal actions.